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In The

Supreme Court of the United States

October Term, 1994

Roy ROMER, as Governor of the State of Colorado, and the State of Colorado,

Petitioners,

v.

Richard G. EVANS, Angela Romero, Linda Fowler, Paul Brown, Priscilla Inkpen, John Miller, the Boulder Valley School District RE-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FOCUS ON THE FAMILY, LUTHERAN CHURCH-MISSOURI SYNOD, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The interest of each *amici* is set forth in the appendix to this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of the Petitioners.

SUMMARY OF ARGUMENT

Whether the equal protection standard is characterized as "rational basis," "substantial justification," or "compelling interest" review,[1] Amendment 2 is justified

[1] Instead of invoking a "suspect class" theory, the Colorado Supreme Court ruled that Amendment 2 violates the Equal Protection Clause because it infringes on the fundamental right of homosexuals to participate equally in the political process. *Evans v. Romer*, 882 P.2d 1335, 1350 (Colo. 1994) (*Evans II*); *Evans v. Romer*, 854 P.2d 1270, 1282 (Colo. 1993) (*Evans I*).

Amici concur with petitioners that Amendment 2 should not be subjected to heightened scrutiny. The opinion below will lead to some absurd results. Legislation routinely makes distinctions between, and imposes burdens on, "independently identifiable groups" and thereby makes the group's political success more difficult. For example, suppose that as a result of local political strength the City of St. Louis grants a deduction from its municipal income tax for school tuition payments. Church-state separationists in out-state Missouri are upset and they adopt an amendment to the state constitution barring state and municipal

by the State of Colorado's compelling interest in protecting religious freedom.[2] There is a veritable explosion of instances where either individuals of faith or religious organizations are being forced to comply with gay-rights ordinances and other nondiscrimination regulations where sexual orientation describes a protected class. Amendment 2 holds considerable promise as a barrier to these restrictions on religious exercise and interventions into the internal operations of religious organizations.

Although the Supreme Court of Colorado agreed that protecting religious freedom was a compelling governmental interest, 882 P.2d at 1342, it opined that Amendment 2 is not the least restrictive means of achieving that interest, indicating that religious exemptions from gay-

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income-tax deductions for school tuition payments. Such an amendment surely inhibits the "equal political participation" of parents who enroll their children in private schools who previously had secured the city income-tax deductions. Nonetheless, it makes no sense to give such a constitutional amendment any more than rational-basis review under an equal protection challenge. Yet that is the result under *Evans I* and *II*.

[2] The trial court held that homosexuals were not a "suspect class" requiring "strict scrutiny" under the Equal Protection Clause. Respondents did not appeal that conclusion of law, thus the Colorado Supreme Court did not address the question. *Evans v. Romer*, 882 P.2d 1335, 1341 n.3 (Colo. 1994) (*Evans II*). Given the present procedural posture, it would seem that the issue of whether homosexuals are a "suspect class" is not before this Court. Nevertheless, should the Court take up the question of "suspect class" status, *amici's* argument is equally applicable to that issue, *i.e.*, the compelling government interest in protecting religious liberty justifies any burden Amendment 2 imposes upon the class.

rights ordinances would be adequate, *id.* at 1342-43.[3] The court was mistaken. The ubiquity of nondiscrimination requirements applicable to religious institutions indicates the efficacy of a measure like Amendment 2. The addition of sexual orientation to these requirements imposes serious burdens upon religious exercise that exemptions do not sufficiently protect. Applying such exemptions to religious organizations is extremely difficult, frequently involving courts in an intrusive examination of a religious institution's doctrine and practice. These disturbing implications, along with the procedural disadvantages inherent in exemptions, plainly justify the enactment of Amendment 2.

ARGUMENT

It can hardly be denied that the morality of homosexual conduct is a matter of heated national debate. It is, as well, the subject of impassioned discussion within religious denominations, local churches, the religious social-service sector, and other ecclesial organizations such as seminaries and religious universities. Theologians, clerics, and laypersons all participate in the debate, and

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[3] Because the state court framed the question before it as two fundamental rights in conflict, it failed to explain its unspoken assumption that the fundamental right to religious liberty may be vindicated only by means less restrictive to gay-equality rather than the other way around. This unexplained subordination of the First Amendment's text so stands constitutional law on its head that one would think it was gay and lesbian egalitarianism that the Congress of 1789 penned into the Bill of Rights rather than the free exercise of religion.

on both sides. Because it confronts religious belief and church autonomy, homosexual practice is a matter which the First Amendment ensures that the confessional communities may work out for themselves and in their own time.

When an interpretation of the scriptural canon is understood to warn against homosexual conduct, obviously a church's own employment practices, its schools with their attendant curricula and codes of behavior, and its social-outreach programs will reflect that moral stance. Accordingly, churches and their subsidiary groups, as well as parachurch organizations, do discriminate against those who engage in homosexual practices. Apologia for the discrimination vary widely, but the three purposes that are most often advanced are: (i) correction of the person in error (for his own well-being); (ii) communication within and without the confessional community of the scriptural teaching on homosexuality (that others may not fall into error); and (iii) protection of the traditional family (a foundation stone of civil society).

Amici's concern is with the independence of religious organizations to pursue their beliefs and practices, as each ecclesiastical body develops its own doctrine, as each defines its own approach to ministry, and as each determines its own programs for meeting human needs.[4]

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[4] *Amici* object strongly to the characterization of religious freedom as a matter of "religious privacy." As reported in *Evans II*, 882 P.2d at 1339 and 1340, apparently counsel for petitioners are prone to commit this error. Shrinking religious liberty to a matter of "privacy" reduces this venerable right to little more than protecting "intimate association." Religion in America has never been private, and attempts to confine religion to out-of-the-way society only confirm Professor Stephen L. Carter's thesis in *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993).

Regardless of ambiguities in the outer reaches of the law concerning juridical safeguards for the autonomy of religious groups, religious pursuits must remain free of governmental interference. Institutional autonomy for religious societies is surely broad enough to include freedom from compliance with gay-rights ordinances. But, in candor, the case law is in flux and not entirely favorable. And popular opinion often runs counter to the orthodox position.

In a single, decisive step, Amendment 2 resolved all these doubts and complexities in favor of religious liberty. The Amendment thus safeguards a venerable right and holds in check expansive government, at least on this discrete but crucial point of law.

I. RELIGIOUS EXEMPTIONS IN GAY-RIGHTS ORDINANCES ARE INADEQUATE FOR THE PROTECTION OF RELIGIOUS LIBERTY.

A. The Clash Between Gay-Rights Ordinances and the Autonomy of Religious Organizations Is More Pervasive than the Opinion Below Admits.

The following hypotheticals illustrate some of the concerns from the perspective of a religious institution and its interest in self-definition and autonomy:

Case 1: Bethlehem Home, a shelter for battered women, is a nonprofit, charitable corporation. It was founded five years ago by the Greater Kansas City Interchurch Coalition, a voluntary association of Pentecostal churches whose members are interested in responding to the high incidence of domestic violence. The City Council, an elected body, has before it an application for a one-time $15,000 grant to upgrade the Home's plumbing and add water sprinklers to meet fire-code requirements. As a condition on all its community-service grants, the city requires that "a grantee's governing board be representative of the community's diversity." There is currently a vacancy on the Home's Board of Directors, and the Gay and Lesbian Alliance is pressuring the City Council to deny the grant unless the vacancy is filled by a woman put up by the Alliance. The church Coalition does not want women sheltered at the Home exposed to lesbianism. The Council denies the grant.

Case 2: The Tiny Tots Center is presently organizing as a for-profit corporation. TTC will be located near a low-income, public housing project on Milwaukee's southside where the need for quality, low-cost child care is acute. The brainchild of an inner-city pastor, TTC plans to keep its fees affordable by locating rent-free in the educational wing of the Lafayette Street Church and using volunteers from the congregation as part-time staff. The Wisconsin Human Services Department will issue a license on condition, *inter alia*, that the TTC is in compliance with all municipal codes and ordinances. The city's gay-rights ordinance has a religious exemption for "bona fide religious organizations

recognized as nonprofit, tax-exempt corporations under section 501(c)(3) of the Internal Revenue Code." Being a for-profit corporation, TTC is not exempt from the ordinance. The church opposes homosexual practice. Volunteer staff will be screened by the church, and conformity to doctrine is an essential criteria. TTC is denied a license to operate.

Colorado's admittedly compelling interest in protecting the institutional autonomy of religious organizations is not satisfied by requiring that municipalities write religious exemptions into their ordinances. As the foregoing hypotheticals illustrate, implementation of the suggestion is more difficult, and such exemptions are far less adequate for the protection of religious liberty than the opinion below admits.

One of the reasons for the difficulty is that the types of gay-rights laws are far more pervasive and diverse than the state court seems to realize. Colorado's Amendment 2 does not just do away with ordinances addressing discrimination in employment and housing. Like civil-rights legislation generally, gay-rights laws can and do take a variety of remedial forms. In addition to employment and housing, there are at least four additional types of ordinances:

1. Following in the pattern of Title II of the Civil Rights Act of 1964, state and local governments have enacted legislation prohibiting discrimination in public accommodations. Unlike Title II, however, the state and local laws broadly define "public accommodations" as

reaching voluntary associations such as youth opportunity groups[5] and residential care homes. This often means that the nondiscrimination requirement extends to volunteers, as well as employees and patrons. When one of the prohibited bases of discrimination is homosexuality, religious youth groups and religious homes for youth[6] find themselves in noncompliance.

The Aspen ordinance, for example, broadly defines "public accommodations" such that a church opening its facilities to meetings of Alcoholics Anonymous would apparently have to also grant access to Act-Up. *See Evans II*, 882 P.2d at 1363 (Erickson, J., dissenting). Amendment 2 resolves these conflicts, simply and unequivocally, in favor of religious liberty.

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[5] Courts in California have held that the Boy Scouts and Girl Scouts are public accommodations. *See Curran v. Mount Diablo Council of the Boy Scouts*, 29 Cal. Rptr. 2d 580 (1994), *review granted*, 874 P.2d 901 (Cal. 1994) (discrimination on basis of sexual orientation); *Randall v. Orange County Council, Boy Scouts of America*, 28 Cal. Rptr. 2d 53, *review granted*, 874 P.2d 900 (Cal. 1994) (discrimination against atheists).

[6] Rawhide Boys Ranch is a Christian residential-care home located in New London, Wisconsin. The Ranch takes in adjudicated delinquents and boys removed from their parents' home. The Ranch hires married couples to serve as "house parents" to the boys. House parents must be Christians (a permissible criteria under the fair employment law for a religious organization) and conform to certain moral behavior. When the Ranch learned that it was subject to a gay-rights law, it asked the state legislature for an exemption. The request was twice rebuffed. *United Press International* (March 5, 1986, March 28, 1986 and November 6, 1987) (available on NEXIS).

2. State and local governments create limited public fora for the speech and speech-related activities of designated groups. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993) (public school creating forum for community organizations); *Widmar v. Vincent*, 454 U.S. 263 (1981) (state university creating forum for student groups). However, access to the limited public fora can be conditioned on compliance with nondiscrimination on the basis of homosexuality. For example, the University of Michigan at Ann Arbor, like most state universities, provides meeting space for university-recognized student organizations. But a recently adopted condition of university recognition is nondiscrimination on the basis of homosexuality. *See* Detroit Free Press, March 23, 1989, at 6A; Detroit Free Press, September 24, 1993, at 1B; Detroit Free Press, May 20, 1994, at 10A. Resolution Revising Regents' Bylaws Section 14.06 Discrimination, University of Michigan Board of Regents (September 24, 1993). Appeals to the Board of Regents for a religious exemption fell on deaf ears. A religious student organization at the University of Illinois at Champaign enjoyed greater success, but only after administrative appeals and threats of litigation. *See* Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994) (describing events at the University of Illinois-Champaign). This presents problems for student religious groups, such as Inter-Varsity Christian Fellowship, Campus Crusade for Christ, and the Christian Legal Society, who select their leaders, *inter alia*, on the basis of adherence to Biblical

morality, including the avoidance of homosexual practices. Amendment 2 resolves this conflict, simply and unequivocally, in favor of religious liberty.

3. Participation in governmental assistance programs is often conditioned on compliance with civil-rights norms. Many religious organizations are eligible for such assistance, such as colleges, *see Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971), social-welfare agencies, *see Bowen v. Kendrick*, 487 U.S. 589 (1988) (teenage counseling center), and health-care facilities, *see Bradfield v. Roberts*, 175 U.S. 291 (1899) (hospital). If one of the prohibited bases of discrimination is homosexuality, religious organizations will be in noncompliance because they often impose personal behavior requirements on staff, faculty, and students.[7]

These "strings" on government assistance proliferate and can take surprising forms. For example, recently three states have begun to require nondiscrimination pledges from charities that raise funds through state employee payroll programs.[8] Civil servants in most states

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[7] A homosexual-rights organization has already made such a claim urging the termination of educational funding. *See Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 30 n.23 (D.C. App. 1987).

[8] *Nonprofits, States Clash: States Add Sexual Orientation Provisions To Requirements*, 8 World 12 (March 13, 1993). Wisconsin bans discrimination on the basis of religion, whereas Massachusetts and Pennsylvania require nondiscrimination agreements on the basis of religion and sexual orientation. In contrast, the current federal payroll-deduction program has an exception for religious organizations discriminating in

are urged to sign payroll authorizations allowing deductions for a favorite charity appearing on an approved list. To make the list, a social-welfare charity must sign an agreement not to discriminate on the bases of, *inter alia*, religion and homosexuality. This presents a coercive problem for religious social-service agencies which for doctrinal reasons set behavioral standards for their employees and volunteers. Amendment 2 resolves these conflicts, simply and unequivocally, in favor of religious liberty.

4. State and municipal tax exemptions, credits, and deductions are often tied to compliance with civil-rights norms. For example, the Minnesota tuition-tax deduction upheld in *Mueller v. Allen*, 463 U.S. 388 (1983), was conditioned on compliance with the state human-rights law. *Id.* at 390 n.1. Similarly, Iowa's tuition and textbook tax deduction/credit for nonpublic school parents mandates nondiscrimination as to the selection and treatment of staff and students.[9] There is no logical reason why these

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employment on a religious basis and makes no reference to homosexuality.

[9] In 1987, Iowa modified its income-tax code to permit taxpayers sending dependents to nonpublic primary and secondary schools to claim a deduction for the costs of tuition and textbooks. Iowa Code §§ 422.9, 422.12 (1993). Non-itemizing taxpayers may claim a credit. Iowa Code § 422.12(2) (1993). To qualify, the nonpublic school must be accredited by the state. Iowa Code § 256.11 (1993). Accreditation is conditioned on compliance with Iowa's civil rights act. Iowa Code § 216 *et seq.* (1993). Although a religious organization may discriminate on the basis of religion, the exemption obtains only if the position relates to a religious purpose of the institution. Iowa Atty. Gen. Op. (Chiodo), February 23, 1978.

tax benefits could not be tied to nondiscrimination on the basis of homosexuality. Amendment 2 heads off any such budding conflict, resolving the matter, simply and unequivocally, in favor of religious liberty.

B. Gay-Rights Ordinances Burden the Religiously Informed Consciences of Individuals.

The Colorado Supreme Court acknowledged that the adequacy of religious exemptions to serve the cause of persons of faith was an open question. As candidly stated by the court below, when the First Amendment has been raised in the face of civil-rights laws, assertions of religious liberty have met with "mixed results." *Evans II*, 882 P.2d at 1343 n.7. *Evans II* cited the case concerning a landlord having to lease premises to a couple engaging in sexual activities at odds with the landlord's religious beliefs. *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1995) (holding that state has compelling interest in enforcing law prohibiting discrimination on the basis of marital status, therefore religious objection of landlord to renting to co-habiting unmarried persons is overridden). Other individuals of faith have clashed with gay-rights ordinances and lost. For example, the members and operator of a health club, citing concerns of body modesty based on religious belief, had no success in their attempt to exclude homosexuals; *see Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784 (Minn. App. 1985), *aff'd mem.*, 389 N.W.2d 205 (Minn. 1986); a minister, fired from an

appointed position on a municipal human-rights commission because of his statements concerning belief in Biblical teachings regarding homosexuality, was found not to have had either his free-speech or free-exercise rights violated; *see Lumpkin v. Jordan*, ___ F. Supp. ___, 1994 WL 669852 (N.D. Cal. 1994); and only after a partial victory on appeal did one pastor win the right to challenge a state-wide gay-rights law that is so broadly drafted that the act punishes an individual for refusing to trade with a homosexual business, for "inciting" others to boycott a homosexual business, and for "aiding, abetting or inciting" others to discriminate against homosexuals in ways that otherwise violate the act. *Presbytery of New Jersey v. Florio*, 40 F.3d 1454 (3d Cir. 1994). The act is so broad that plaintiff's Sunday sermon could get him arrested.

In straightforward fashion, Amendment 2 would sort out each of these cases and resolve them on the side of freedom of speech and freedom of religion.

C. Religious Exemptions in Gay-Rights Ordinances Will Generate Detailed Inquiries into Religious Doctrine and Involve Administrative Officials and Inevitably the Judiciary in Ecclesiastical Questions.

The court below held that religious exemptions in gay-rights ordinances would satisfy Colorado's admittedly compelling interest in preserving religious liberty. This presumes it will be easy to determine which persons of faith and which religious organizations qualify for the exemption. But the task is not easy, and the fact-finding

needed to make such determinations raise new and difficult First Amendment problems of their own.

Religious exemptions appearing in legislation are basically of four types. First, there are exemptions for "churches and other houses of worship." But this excludes religious organizations unaffiliated with any church. The constitutionality of such a narrow exemption was the issue raised but never decided in *California v. Grace Brethren Church*, 457 U.S. 393 (1982).[10] Religious organizations comprise quite a long and differentiated list: everything from preschools to nursing homes to soup kitchens to shelters for battered women to financial-counseling centers.[11] In non-hierarchial churches, common

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[10] The federal unemployment tax law exempts services performed while in the employment of a church. In *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), the Court held that the word "church" in the tax law included schools that have no separate legal existence from a church. *Grace Brethren* presented the question whether the exemption was applicable to a school separately incorporated from a church, and, if not, whether the discriminatory nature of the legislative exemption violated the First Amendment. Because this Court dismissed on jurisdictional grounds, there still is no resolution of the First Amendment question.

[11] A nonexhaustive list includes preschools and child day-care centers; temporary shelters for abused children; foster homes and adoption placement agencies; residential-care or group-care homes for abused or neglected children and adjudicated juvenile offenders; adolescent or teen counseling centers; crisis-pregnancy counseling centers; maternity homes for women with crisis pregnancies; temporary shelters for battered women; rehabilitation centers for alcoholics, drug abusers, and the unemployed; AIDS hospices; prison ministries, police and prison chaplaincies; halfway houses for adults convicted of crimes; storehouses of free (or reduced-price) food, used

within Protestantism, many religious organizations are entirely unconnected to a church.

Second, there are exemptions for religious organizations when discriminating on the basis of religion in the filling of positions requiring "religious" duties but not when filling "secular" jobs.[12] This raises the issue presented in *Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980), *aff'd mem.*, 456 U.S. 951 (1981), striking down an ordinance that charged minor city officials with the issuance

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clothing, and household items; centers for free meals (soup kitchens) and temporary shelters for the homeless (rescue missions); low-income housing renovation programs; refugee aid and resettlement; disaster relief; clearinghouses for volunteers rendering home-based care to the disabled; long-term care facilities for the disabled, retarded, and mentally ill; long-term care facilities for the elderly (retirement, nursing, and invalid homes); elderly day-care centers; centers for vocational training or employment of the disabled; literacy and English-as-a-second-language programs; hospitals and community-health clinics; dispute resolution and legal-aid centers; draft counseling centers; financial-counseling centers; marital and family-counseling centers; recreational programs, summer camps and retreat centers for youth and adults; and, support groups of every stripe for persons suffering from life's many vicissitudes.

Compare F. Ernest Johnson, ed., *Religion and Social Work* 19-25 (Harper, 1956), *with* Phillip R. Popple and Leslie Leighninger, *Social Work, Social Welfare, and American Society* 105-108 (Allyn & Bacon, 2d ed. 1993).

[12] The clash between equality and liberty over the applicability of civil-rights acts to "secular" jobs at pervasively religious organizations is a familiar one. *See, e.g., EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

of a permit contingent on a determination of whether the collection of money solicited by a church was for "secular" or "spiritual" purposes. The lower courts in *Espinosa* struck down the ordinance because it caused detailed probing into religious motives and doctrine. Moreover, this Court has recognized the First Amendment problems when the government attempts to divine what jobs are sufficiently related to the mission of a religious organization as to merit exempt status. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987); *id.* at 344-45 (Brennan, J., concurring).

Third, there are exemptions for religious organizations when discriminating on the basis of religion, but not for discrimination motivated by race, national origin, gender, disability and age.[13] Thus, the question arises as to whether an employment decision was religiously motivated and hence lawful, or not religiously motivated and hence unlawful.[14] Is discrimination on the basis of homosexuality religiously motivated? This can be a very difficult question because it goes to motive. Religious defendants will raise the religious-exemption defense. In

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[13] This is the sort of religious exemption added in 1972 to Title VII of the Civil Rights Act of 1964. Accordingly, under federal law religious organizations may discriminate in employment in favor of co-religionists. The exemption was held not to violate the Establishment Clause in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). For discussion about the congressional concern over the narrowness of the pre-1972 exemption and the free-exercise of religion, *see id.* 336.

[14] Typical would be the question whether a discharge for out-of-wedlock pregnancy is based on religion or gender. *See Dolter v. Wahlert High School*, 483 F. Supp. 266 (N.D. Iowa 1980) (prohibiting dismissal of parochial school teacher for pregnancy out-of-wedlock).

the latter instance, the plaintiff's position will be that the professed religious motive is a pretext.[15] Such detailed judicial inquiries into religious matters, including doctrine and clerical motives, have been strongly discouraged by this Court. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983); *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981); *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981); *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970); *Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940) (petty officials not to be given discretion to decide what is a legitimate "religion" for purposes of issuing solicitation permit).

Finally, there are exemptions for "religious" organizations as distinct from "nonreligious" organizations. Churches and other houses of worship qualify easily enough, but more difficult are organizations said to be "religious" but that make no claim to being a "church." The most difficult problem is determining just how "religious" an organization must be to qualify as "religious" for purposes of the exemption. Some schools and social-welfare agencies are at the very "core" of the given religion. Others are parachurch groups, meaning that they are not under the corporate control of any church of denomination, albeit they may be explicitly and self-consciously Protestant, Catholic, Jewish, etc. *Compare* F.

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[15] The situation is similar to that said to present a "serious First Amendment question" in *NLRB v. Catholic Bishop*, 440 U.S. 490, 502-04 (1979). In order to avoid federal entanglement into the employment relationship between religious school officials and lay teachers, in *Catholic Bishop* the Court construed the labor relations act as not applying to parochial schools.

Ernest Johnson, ed., *Religion and Social Work* 17-19 (Harper 1956), *with* Phillip R. Popple and Leslie Leighninger, *Social Work, Social Welfare, and American Society* 105-108 (Allyn & Bacon, 2d ed. 1993). There are many different ways of gauging the degree of this "connectedness," *e.g.*, the extent to which religious creed guides decision-making; the extent of religious content of the curriculum or program; the degree of control by a parent church; the extent to which the governing board is comprised of officers or members of the parent church; whether officers and staff are selected exclusively from members of the parent church; the extent of financial support by the parent church; the extent to which funding is supplied by contributors of the same faith; and the extent to which the clientele served are exclusively of the same faith. Quite apart from the degree of connectedness, the extent to which the social-service agency has retained its religious fervor and distinctiveness will vary with each organization. If the organization is no longer very "religious," presumably the religious exemption in a gay-rights ordinance is unavailable.

The Internal Revenue Service is the most experienced agency with these determinations, but it hardly operates without controversy. *See* Charles Whelan, *Governmental Attempts to Define Church and Religion*, 446 The Annals, AAPSS 32 (Nov. 1979); Charles Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 Fordham L. Rev. 885 (1977); Edward M. Gaffney, Jr., *Governmental Definition of Religion: The Rise and Fall of the IRS Regulation of an "Integrated Auxiliary" of a Church*, 25 Valparaiso Univ. L.Rev. 203 (1991). The distinction in the exemption between "religious" and "nonreligious" is not

unlike the general difficulty in defining "religion" for purposes of the First Amendment. *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. Ill. L. F. 579; Sharon I. Worthing, *"Religion" and "Religious Institutions" Under the First Amendment*, 7 Pepperdine L. Rev. 313 (1980). Occasionally the task has to be performed by the judiciary, but it should be avoided whenever possible.

The form and number of religious organizations is far more variate and complex than is commonly appreciated.[16] And the degree of religious "fervor" of these organizations runs from the intensely confessional to groups that have become so much a part of the "worldly" culture that they are not easily differentiated from their secular counterparts. *See* H. Richard Niebuhr, *Christ and Culture* (1951) (typology of five paradigms of Christian ways of relating to the world).

The foregoing parameters concerning the nature of religious organizations are relevant depending on how a municipality has drafted the religious exemption in its ordinance. They reveal the difficulty a court will have in determining if a particular exemption applies to a given organization that is more or less related to a central religious body like a synagogue or church. Hence, the parameters bear upon the First Amendment question of institutional autonomy. Taken together, these considerations render unwieldy the suggestion by the state

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[16] The United States presently has over 1,600 denominations, 44 percent of them non-Christian. Over half these denominations have first organized since 1960. J. Gordon Melton, *Encyclopedia Of American Religions* (4th ed., 1995).

supreme court that religious exemptions from gay-rights laws are adequate.

The adoption of Amendment 2 made the foregoing tasks unnecessary. The use of religious exemptions in gay-rights ordinances makes performing these unwelcome tasks inevitable. Only Amendment 2 cleanly and quickly vindicates the state's compelling interest in safeguarding religious freedom.

II. RELIGIOUS EXEMPTIONS IN GAY-RIGHTS ORDINANCES ARE AFFIRMATIVE DEFENSES, THUS PROCEDURALLY DISADVANTAGING CLAIMS OF RELIGIOUS LIBERTY.

A religious exemption in an ordinance provides an affirmative defense to a discrimination claim. There are procedural disadvantages to an affirmative defense as opposed to a plaintiff not being able to state a *prima facie* claim in the first instance.[17]

With an affirmative defense, the defendant charged with discrimination carries all the burdens: the burden of pleading, the burden of producing evidence demonstrating the exemption's applicability, and the risk of nonpersuasion. The burden of demonstrating that the scope of the exemption is broad enough to include the defendant

[17] This procedural point is also applicable where the gay-rights ordinance is backed by criminal sanctions. The Aspen ordinance, for example, imposes criminal penalties for discrimination on the basis of sexual orientation in employment, housing, and public accommodations. Aspen has a religious exemption, but it is too narrow to protect religious freedom in many instances. *See Evans II*, 882 P.2d at 1363.

can be quite difficult, as discussed *supra* Part I. The risk of nonpersuasion when the finder of fact is a jury can present special difficulties for religious groups. Juries often find religion puzzling (except for their own), and hostility is common when religious groups demand an exemption from social duties borne by all others.[18]

Amendment 2 disables plaintiffs from even stating a claim upon which relief can be granted. Hence, suits may be handled summarily on motions to dismiss or summary judgment. Indeed, suit will probably never be filed or even threatened, thereby avoiding any "chilling" of First Amendment activity. Religious groups understandably fear protracted and expensive litigation, with its attendant bad publicity, for most are nonprofits that exist on charitable contributions and hence their good image and the public's beneficence.

Any experienced trial lawyer will see immediately that it is fanciful to equate religious exemptions in gay-rights ordinances with Amendment 2's straightforward protection of religious free exercise and institutional autonomy.

[18] Concerning likely prejudice or incomprehension by juries when it comes to judging religious claims, *cf. United States v. Ballard*, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting) ("When one comes to [a jury] trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.").

III. THE UNCERTAINTY IN FIRST AMENDMENT PROTECTION OF RELIGIOUS INDIVIDUALS AND ORGANIZATIONS FACING CLAIMS UNDER GAY-RIGHTS LAW COMMENDS AMENDMENT 2 AS A DECISIVE AND STRAIGHTFORWARD RESOLUTION OF THE ISSUE IN FAVOR OF RELIGIOUS LIBERTY.

The extent to which the First Amendment presently protects the autonomy of religious organizations is unclear. Although a gay-rights law cannot be enforced if it purposefully discriminates against religion, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993), a law's discriminatory effect is not, without more, violative of the Free Exercise Clause. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

Even in the face of purposeful targeting of religious practices, government may proceed to enforce a non-discrimination law if the law furthers a compelling interest.[19] Without Amendment 2 in place, it is not farfetched

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[19] For example, the eradication of racial discrimination in education has been found compelling so as to overcome conflicting religious practices in *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). A conflict between sex discrimination and contrary religious practices was the issue on the merits presented in *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986). But the issue was left unanswered when this Court reversed and remanded with directions to the lower federal court to abstain. When nondiscrimination norms were attached to federal funding, claims by a religious college for institutional autonomy were rebuffed in *Grove City College v. Bell*, 465 U.S. 555, 575-76 (1984). But the college in *Grove City* did not explicitly rely upon the Religion Clauses since the matter was not confessional with the college, thus leaving unresolved the viability of the First Amendment defense.

to anticipate in the near future a court holding gay-equality a compelling interest overriding religious liberty. Already one lower federal court has held that a church-affiliated university must comply with a municipal gay-rights law. *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. App. 1987) (Roman Catholic university need not formally recognize homosexual student group, but university must provide services to homosexual group equal to services provided other student organizations).

Generally applicable taxation and labor regulation of religious organizations have been upheld by this Court, so long as similarly situated nonreligious organizations are subject to the same legislation. *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378, 383-98 (1990) (sales and use taxes); *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303-06 (1985) (minimum wage and maximum hours laws). On the other hand, there is strong language by this Court concerning the imperative of autonomy for religious organizations in a long line of cases involving property disputes. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708 (1976) (civil courts may not probe into procedures churches used to remove clerics); *Maryland & Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 (1970) (in resolving church property disputes, civil courts may not adjudicate questions of church doctrine); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969) (judicial interference hazards inhibiting the free development of religious doctrine and implicating secular interests in matters of solely ecclesiastical concern); *Gonzalez v. Archbishop*, 280 U.S. 1 (1929); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131 (1872); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *see also*

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 335 (1987) (ability of religious organizations to define and carry out their missions); *id.* at 342-43 (Brennan, J., concurring in the judgment) (religious organizations need to be able to discriminate in favor of co-religionists as employees).

Typical is *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952), to the effect that the First Amendment contains "a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." But doubt remains concerning the extent to which these intra-church cases, entailing as they do property disputes, protect religious organizations from gay-rights legislation that is generally applicable and neutral as to religion.

In 1993, Congress adopted and the President signed the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4. However, its constitutionality is being questioned,[20] and, in any event, it remains to be seen how forcibly the courts will enforce the act's provisions. *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1 (1994), and Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209 (1994).

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[20] One federal district court has found the act unconstitutional. *Flores v. City of Boerne*, ___F. Supp. ___, 1995 WL 118446 (W.D. Tex. 1995), *appeal docketed*, No. 95-00067 (5th Cir. Mar. 22, 1995).

The compatibility of religious exemptions with the Establishment Clause also remains in doubt. This Court upheld a legislative exemption in Title VII of the Civil Rights Act of 1964, in *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). However, concurring opinions signed by four Justices indicated that they would limit the constitutionality of religious exemptions to nonprofit organizations. *Amos*, 483 U.S. at 340 (1987) (Brennan, J., concurring in the judgment, joined by Marshall, J.); *id.* at 346 (Blackmun, J., concurring in the judgment); *id.* at 349 (O'Connor, J., concurring in the judgment). This suggests that religious exemptions will be closely examined, and those too broad in scope remain open to Establishment Clause attack.

Amendment 2 avoids all these uncertainties in the law and resolves the matter in favor of religious liberty for religious organizations.

CONCLUSION

The social agenda of gays, lesbians, and bisexuals is moral legitimacy for their sexual practices. They pursue this cause with vigor. Religion, at least orthodox and traditional religions, generally deny them moral legitimacy. This places religion foursquare in their path. Accordingly, religious persons and religious groups – and hence free exercise and institutional autonomy – are not a mere side issue in this case. *See* Richard F. Duncan, *Who Wants To Stop The Church: Homosexual Rights Legislation, Public Policy, And Religious Freedom*, 69 Notre Dame L. Rev. 393 (1994).

Amendment 2 is an effective way of protecting religious liberty. Contrary to the state supreme court, religious exemptions to gay-rights ordinances do not adequately protect the freedom of religious individuals and the autonomy of religious institutions. Such ordinances affect religious entities in more ways than is commonly presumed, and the various types of exemptions commonly seen are vexing to apply. The compelling nature of protecting religious liberty justifies any burden upon equal protection interests imposed by Amendment 2.

More broadly, homosexuality is an issue about which there is vigorous, often intransigent, debate. The wide range of thoughtful, studied positions on this question reflect the intellectual and moral diversity of this Nation's people. *Amici* respectfully suggest that this Court should not preempt or debilitate such a robust but complex discussion. Instead, the context of this case calls for application of the passive virtues.

For the foregoing reasons and authorities, *amici* request that the decision of the people of the State of Colorado be respected and the decisions of the Supreme

Court of the State of Colorado in *Evans I* and *II* be reversed.

Respectfully submitted,

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APPENDIX

INTEREST OF THE *AMICI*

The **Christian Legal Society**, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious exercise and autonomy in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but

only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The **Catholic League for Religious and Civil Rights** is the nation's largest Catholic civil rights organization. Founded in 1973 by the late Father Virgil C. Blum, S.J., the Catholic League defends the right of Catholics – lay and clergy alike – to participate in American public life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League works to safeguard both the religious freedom rights and the free speech rights of Catholics whenever and wherever they are threatened.

The **Southern Baptist Convention (SBC)** is the nation's largest Protestant denomination, with over 15.6 million members in over 39,900 local churches. The **Christian Life Commission (CLC)** is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in

national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases, such as this case.

Focus on the Family is a California religious nonprofit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week, many of which express concern over the evident attempt of homosexual persons who seek to obtain civil and other rights which are greater than those afforded to other persons. Focus on the Family represents Americans, numbering in the hundreds of thousands, who oppose the granting of special rights to homosexuals, or the creation of a new, legally-recognized status of homosexuality which will lead to the extension of special protection to those persons who have chosen a particular form of behavior.

The **Lutheran Church-Missouri Synod** is the second largest Lutheran denomination in the United States. It has approximately 6,000 member congregations which, in turn, have approximately 2,600,000 individual members.

In 1973, the congregations of the Synod in convention passed the following resolution:

Resolution 2-04

"WHEREAS, God's Word clearly identifies homophile behavior as immoral, and condemns it (Lev. 18:22; 20:13 and Rom. 1:24-27); and

WHEREAS, The Law and the Gospel of Jesus Christ are to be proclaimed and applied to all conditions of mankind; therefore be it

Resolved, That the Synod recognize homophile behavior as intrinsically sinful; and be it further

Resolved, That the Synod urge that the Law and Gospel of the Scriptures be applied to homophiles as appropriate with a view toward ministering the forgiveness of our Lord Jesus Christ to any and all sinners who are penitent . . . . "

As a result of its deeply-held religious belief on homosexual behavior, the Council of Presidents of The Lutheran Church-Missouri Synod in 1991 adopted "Guidelines for Ecclesiastical Supervisors of The Lutheran Church-Missouri Synod in Addressing Instances of Homosexuality in the Lives of Professional Church Workers". These Guidelines are to be followed when professional church workers, including pastors and teachers, are found to be homosexual or to have engaged in homosexual behavior.

Laws prohibiting entities, including churches and religious organizations, from acting as they deem proper with respect to homosexual employees, based upon strongly-held religious beliefs, infringe upon the free

exercise of religion. Amendment 2 protects the free exercise of religion of religious entities in Colorado with respect to homosexuality and homosexuals and should be upheld.

The **National Association of Evangelicals (NAE)** is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.